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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 564

ELSA M. OLESEN,

Petitioner,

vs.

THE TRUST COMPANY OF CHICAGO, AS TRUSTEE UNDER TRUST AGREEMENT DATED MARCH 23, 1945, AND KNOWN AS TRUST NO. 4526; AND A. KAMENJARIN AND LAFAYETTE FISHER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of The United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, dismissing the Petitioner's Appeal, entered in the above entitled cause, pursuant to its decision dated June 27, 1957. A petition for rehearing was timely filed. On July 22, 1957, the Court denied the petition for rehearing.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is reported in 245 F. (2d) 522, affirming the decision of the dismissal of the Complaint by the District Court, which opinion is annexed to this Petition as **Appendix A**.

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Seventh Circuit on June 27, 1957, and rehearing denied on July 22, 1957. The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, 28 U.S.C.A. 1254 (1), this Petition having been filed within ninety days.

QUESTIONS PRESENTED

1. Was the Petitioner's case within the letter and spirit of the FEDERAL DECLARATORY JUDGMENT ACT?

   A. If so, can a Federal Court enjoin the enforcement of a state judgment if the same be void under the National Constitution?

   B. What effect, if any, does the affirmance of a void state judgment by the State Appealing Courts have, if the original State Judgment were constitutionally null and void?

   C. Isn't the decision in the instant case in direct confliet with the prevailing decisions of this Court?

2. Does the theory of *Res Adjudicata* apply to the instant case?

3. Has the Illinois Judiciary violated the Petitioner's Federal rights, privileges and immunities, due process, and the equal protection of the laws?

STATEMENT OF THE CASE

Petitioner (a widow) filed a common law action against the Respondents, The Trust Company Of Chicago (Trustee), A. Kamenjarin (a real estate broker), and Lafayette Fisher (an attorney at law), with a demand for jury trial, in the Superior Court of Cook County, Illinois, on November 20, 1946 (No. 46 S 21920), to recover a deposit of $25,000.00, made by her in connection with a real estate contract for the purchase of certain real property. The recovery was sought on the grounds of fraudulent representations made by the Respondents both in the making and in the inducement of said contract, duress, lack of mutuality of obligation, and divers other equities.

Subsequently, the Petitioner's then attorney made an improvident move in amending her complaint-at-law by the addition of a Count in Chancery, purporting to seek an *incidental remedy* of cancellation of a judgment-note in the sum of $10,000.00, which the Petitioner had given to the Respondent, THE TRUSTEE, as part of her aggregate deposit of $25,000.00.

Hearing on the incidental Chancery-Count was referred to a Master in Chancery. When the Petitioner was advised she might jeopardize her right to trial by jury (thereby), she immediately employed additional, independent counsel for the specific purpose of preserving her constitutional right to such trial and refused to proceed before the Master; and moved before the Chancellor for leave to withdraw, non-suit, or otherwise voluntarily dismiss said Count in Chancery. Her repeated motions were denied, with the result that she was afforded no opportunity to present her case, or have her day in court, at any time *and* at any forum whatsoever.

The Master recommended, in the absence of Petitioner's testimony, to dismiss the Chancery Count for want of equity; whereupon, the several Respondents amended their Answers to her Law Count, urging that the dismissal of the Equity Count was a bar to any relief for the Petitioner. The Court entered judgment in favor of THE TRUSTEE upon the petitioner's judgment-note for $10,000.00 (on the Equity Count), and dismissed the law count of the Petitioner.

From the adverse decision of the Superior Court of Cook County, Illinois, the Petitioner took an appeal to the Illinois Appellate Court, First Division, which Court affirmed the decision below in 4 Ill. App. (2d) 372, 124 N.E. (2d) 32.

Petitioner then sued out, on April 20, 1955, a Writ of Error to the Supreme Court of Illinois (No. 33661), which Writ was dismissed by that Court without an opinion. On September 15, 1955, the same Court denied the Petitioner's motion to reinstate the Writ of Error (without an opinion).

Petitioner, having fully *exhausted* all her remedies in the State Courts of Illinois, instituted a Declaratory Judgment suit in equity, on June 25, 1956, in the United States District Court for the Northern District of Illinois, Eastern Division (No. 56 C 1070), seeking declaratory and injunctive relief against the Respondents. The several Respondents filed Motions to Dismiss the Complaint, which complaint was dismissed for lack of jurisdiction (February 15, 1957) without an opinion; and, on March 1, 1957, the Petitioner's Motion to re-consider was denied without an opinion.

Thereafter, Petitioner perfected an appeal to the United States Court of Appeals for the Seventh Circuit, which

Court, in response to Respondents' Motions to Dismiss the Appeal, affirmed the dismissal of the complaint by the Court below, and dismissed the Appeal (June 27, 1957) in 245 F.[2](2d) 522; which opinion is appended to this Petition as **Appendix A.** On July 22, 1957, the Court of Appeals denied Petitioner's Motion for a rehearing without an opinion.

Petitioner now files her Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER'S CASE IS WITHIN THE SPIRIT AND LETTER OF THE FEDERAL DECLARATORY JUDGMENT ACT

This action was instituted under the Federal Declaratory Judgment Act of 1934, as amended in 1954, 28 U.S.C.A. 2201 and 2202; Paragraph 2201 reads:

> "In a case of actual controversy within its jurisdiction, any court of the United States, and the District Court * * * may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree * * *".

The Petitioner's case sets forth facts sufficient to show that this is a case of actual controversy between the plaintiff and the defendants, tending to show that the judgment, procured in the Superior Court of Cook County, Illinois, against the plaintiff is null and void and is unenforceable. It is thus obvious that the prime jurisdictional requisite of an *actual controversy* exists between the contesting parties in the case at bar. The dispute is

definite and concrete, susceptible of judicial determination. It does not call for an advisory opinion upon a hypothesis, but for an adjudication of present rights upon facts. In *Aetna Life Ins. Co.* v. *Haworth*, 57 S. Ct. 461, 300 U.S. 227, at 239-41, 81 L. Ed. 617, 108 ALR 1000, Chief Justice Hughes said in 1937:

> " • • • 'cases of actual controversy' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense • • •. A 'controversy' in this sense must be one that is appropriate for judicial determination. (Citing cases). A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. • • • To deny jurisdiction here would be to thwart the beneficial purposes for which the Declaratory Judgment Act was enacted".

To the same effect are: *Aetna Life Ins. Co.* v. *Martin, et al.*, 108 F. (2d) 824 (CCA 8), *Stephenson* v. *Eq'ble Life Assur. Soc.*, 92 F. (2d) 406 (CCA 8, 1937), and *Mutual Life Ins. Co. of N. Y.* v. *Krejci*, 123 F. (2d) 594 (CCA 7, 1941).

As to what constitutes *controversy* within the Act as contra-distinguished from *abstract question*, as a test, is well defined by Mr. Justice Douglas (in 1941) in *Md. Casualty Co.* v. *Pacific Coal & Oil Co.*, 61 S. Ct. 510, 312 U.S. 270, 85 L. Ed. 826. The facts alleged in this Petitioner's complaint show, in harmony with the foregoing opinion, a *substantial controversy* between the parties having adverse legal interests, and of "*sufficient immediacy and reality* to warrant the issuance of declaratory judgment".

In *Nashville, C. & St. L. Ry.* v. *Wallace*, 53 S. Ct. 345, 288 U.S. 249, 264; 77 L. Ed. 730, Mr. Justice Stone went into the history of the Act, and announced at p. 264:

> "Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. * * * (The Act) changes merely in the form or method of procedure by which Federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceedings, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below".

Prof. Edwin Borchard, an eminent scholar on the subject, in his comment upon the *Nashville* opinion, states that in the light of the 1200 decisions of American State Courts and of thousands of decisions in England and elsewhere, any other conclusion would have been unusual. (His Text, p. 246, *Declaratory Judgments*, Cleveland, 1934).

These reflections lead us to the conclusion that the Act, in conferring jurisdiction on the courts of the United States to declare the rights of parties in certain cases, is mandatory, and a District Court cannot in its discretion decline to take jurisdiction and declare the rights of the parties in a case of actual controversy. See *Aetna-Haworth*; *Carpenter, et al.* v. *Edmonson*, 92 F. (2d) 895, 897 (CCA 5, 1937). In the *Haworth* case, the Supreme Court, in reversing the District Court, held:

> "Our conclusion is that the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act". (300 U.S. at 244)

So that courts may not decline the exercise of jurisdiction conferred upon them thereunder. Before the Federal Declaratory Judgment Act only the normal plaintiff could

commence an action; but when that action was properly commenced, the courts had no right to refuse to decide it. As was said by Mr. Chief Justice Marshall in *Cohens* v. *Virginia*, 5 L. Ed. 256, 6 Wheat. 264, 404:

> "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the court. Questions may occur, which we would gladly avoid; but we cannot avoid them".

See p. 538, *The Constitution of the U. S. A., Analysis and Interpretation*, by Edward S. Corwin, U. S. Printing Office, 1953.

And in *E. Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. (2d) 852, 854 (1947) it was held that the Declaratory Judgment Act merely introduced additional remedies. It modified the law only as to procedure. But the recent "decisions do not authorize a court to refuse arbitrarily to exercise jurisdiction when its jurisdiction is invoked by appropriate proceedings." *Amer. Auto. Ins. Co.* v. *Freundt*, 103 F. (2d) 613, 616 (CCA 7, 1939). Nor can it be exercised or denied at any whim of the trial court. *Mutual Life Ins. Co. of N. Y.* v. *Krejci*, 123 F. (2d) 594 (CCA 7, 1941); *E. B. Bliss Co.* v. *Cold Metal Process Co.*, 102 F. (2d) 105, 9 (CCA 6, 1939).

We sincerely urge that the Circuit Court in by-passing this point fell into judicial error, which is a reason for granting this Writ, and the same should be reviewed by this Court.

II. THE PRINCIPLE OF RES ADJUDICATA DOES NOT APPLY TO THE INSTANT CASE

It is the contention of the Petitioner that the decision of the State Courts is immaterial in that the issues presented therein were different from the issues presented in the present case. The cause of action in the State Court was based upon fraudulent misrepresentations, undue influence, lack of mutuality of obligation, and other equities, having reference to the making and inducement of a real estate contract; whereas the cause of action in the Federal Courts is based, squarely, upon the violation of certain constitutional rights. Said Mr. Justice Field in *Cromwell v. Sac County*, 94 U.S. 351, at 352-3:

> "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action . . . But where the second action between the same parties is upon a different claim or demand, the judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered."

In the *Happy Elevator No. 2* case, (209 F. (2d) 459) the Court declared at p. 461:

> "A judgment in a prior action between the same parties or their privies was not based upon the same claim or cause of action as in the second, but which involved the determination of the issues that are in the second action, will operate as an estoppel only as to those issues, claims or defenses, which were actually litigated or determined".

In *Harding Co.* v. *Harding*, 352 Ill. 417, it was held:

> "Where the former adjudication is relied on as an absolute bar to a subsequent action, it must be shown that the causes of action * * * are the same in both proceedings. * * * It is clear that the causes of action in the *Howard* v. *Insull* (294 Ill. App. 2d) case and in our case are not the same". (p. 426)

We conclude, therefore, that the *Doctrine of Res Adjudicata* has no application to the cause at bar since the element of the identity of the causes of action is wanting; and that, the judgment of the Superior Court of Cook County, Illinois, was no bar to this action in the Federal Courts; and that the Court of Appeals erroneously misapprehended the spirit of this issue, and, therefore, the same should be reviewed by this Court.

III. A FEDERAL COURT MAY DECLARE A STATE JUDGMENT VOID ON JURISDICTIONAL GROUNDS IF THE SAME WERE RENDERED IN VIOLATION OF FEDERAL RIGHTS OF A CITIZEN, AND IT MAY ENJOIN THE ENFORCEMENT THEREOF

Petitioner contends that the matter in controversy arises under the Constitution of the United States, involving a *substantial Federal question;* that her right to relief from the Judgment of the State Court is predicated not on the ground that the same is merely *erroneous*, but on the ground that it is absolutely *void* because rendered without jurisdiction.

A. A Federal Court may question the validity of State judgments on constitutional grounds.

In *Sargeant* v. *Grimes*, 70 F. (2d) 121 (CCA 10, 1934), the United States District Court and the Circuit Court of Appeals assumed jurisdiction of an action brought by the

plaintiff to enjoin the enforcement by defendant of a judgment entered in his favor against the plaintiff. Both parties were residents of Colorado, and the jurisdiction was alleged to exist solely because the claim arose under the Constitution of the United States.

In *Firestone Tire & Rubber Co.* v. *Marboro Cotton Mills*, 282 F. 811, 14 (CCA 4, 1922), it was asserted that a Federal Court, in the exercise of its equity power, may, and should in a proper case, enjoin the collection of a judgment fraudulently or unlawfully obtained in a state court". See: Borchard's *Declaratory Judgments*, p. 247.

In *American Surety Co.* v. *Baldwin*, 53 S. Ct. 98, 287 U.S. 156, 77 L. Ed. 231, 1932 (Idaho), the U.S. District, Circuit, and the Supreme Courts, assumed jurisdiction for the purpose of deciding whether an injunction should issue to restrain the enforcement of a state court judgment alleged to have been entered without jurisdiction and to be void for want of due process. Upon the question of the right to seek relief by injunction in the United States Courts against the enforcement of a void state court judgment, Mr. Justice Brandeis of the Supreme Court said in 1932, at p. 164:

> "The Surety Company was at liberty to resort to the Federal Court regardless of citizenship, because of entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment * * * and it was at liberty to invoke the Federal remedy *without first pursuing that provided by state procedure*". (Italics supplied)

In *Hovey* v. *Elliott*, 17 S. Ct. 841, the validity of a state court judgment was at issue in a proceeding in which service of process had been made. The defendant had appeared and answered, but in which the the answer had then

been improperly stricken and a *Decree pro confesso* had been entered. That decree was held to be without jurisdiction, because the defendant had been wrongfully denied a hearing.

In *Roberts* v. *Anderson*, 66 F. (2d) 878 (CCA 10, 1933), an Oklahoma Court decision as to heirship was held not binding on the United States District Court for that District. In the state case, Oklahoma Court denied appellee a hearing and the right to counsel of her own selection. This court cited *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914, and held that the hearing in the state Probate Court did "*not accord with those fundamental notions of substantial justice* which due process demands. The hearing was more abortive than that condemned in *Powell* v. *Alabama*, 287 U.S. 45, 77 L. Ed. 158, 84 ALR 527, 53 S. Ct. 55". (Italics supplied)

Our conclusion is that the validity of a state judgment may be questioned by a Federal Court on constitutional grounds.

B. The Court of Appeals Misinterpreted the Rule of Law Having Reference to Voluntary Dismissal and Non-Suit of Causes.

The instant case of the petitioning widow (in its peculiar state of facts) shows that the acts of the Cook County Superior Court, Illinois, are not merely *erroneous* but *null and void* for lack of jurisdiction. That trial court did not permit, contrary to the rules of Due Process and equal Protection of the Fourteenth Amendment and the jury requirement in civil case of the Seventh Amendment—that State Court did not permit the petitioner to amend, on any term, her then amended complaint by withdrawing the Chancery Count and by docketing the cause on the law

side so as to try the issue before a jury. Repeatedly did the plaintiff raise a pitiful hand to her then judicial masters (R. 8-10, pars. 11-13), but the Chancellor stood like an eternal constant! His repeated answer was:

> "The plaintiff • • • *again moves* (italics ours) for leave to amend the Amended complaint by withdrawing, Count II, entitled 'Separate Action; in Chancery', of her Amended Complaint, and to dismiss said Count • • • as if said Count II had been originally omitted. • • •
>
> It is Ordered that said motion be denied".

The least one can utter, under the circumstances, is that the ensnarement of a widow into the lion's den is no part of our judicial system; nor does it form any substantial part of our juridical idealism which is "in progress" • • •. In the United States says Dean Pound,* "a revival of philosophical jurisprudence has definitely begun and conscious attempt to make the law conform to ideals is once more becoming the creed of jurisprudence". Substantive federal rights are far greater than any rule of Court. Here was a common law action commenced, in the first instance, with a jury demand. Thereafter a mis-step was taken in the cause in the amendment of Petitioner's Complaint at law, by adding a second, *incidental* Count in Chancery. Upon realization of the consequences of such a mis-step, plaintiff at once employed additional, independent counsel for the specific purpose of retracting and abandoning that mis-step. You cannot find such a constancy in a court whose procedure may be said to accord with fundamental notions of substantial justice due process would seem to demand, as was observed in the *Roberts* case! It was that constancy that led the State Court to

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* **The Spirit of the Common Law**, pp. 81-82. Boston: Marshall Jones Co., 1921.

enter the Judgment against the plaintiff by denying her a hearing contrary to her federal rights; and it was that act of the State Court that excluded the plaintiff from its jurisdiction, and made it impossible for her to testify. Long, long ago, Mr. Justice Field, that prophet-revolutionary, remarked that jurisdiction is the right to hear and determine, not to determine wthout a hearing. *Windsor* v. *McVeigh*, 93 U.S. 274, 83-4; 23 L. Ed. 914. In the case at bar, the State Court condemned the Petitioner before it accorded her a hearing, depriving her of property rights without due process of law, guaranteed by the Fourteenth Amendment to the National Constitution!

The Rule of Law that should have guided the Opinion of the Court of Appeals was stated in *Jones* v. *Securities and Exchange Commission*, 56 S. Ct. 654 at 657, 298 U.S. 1, 80 L Ed. 1015, 1936:

> "The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter. *Pullman's Palace Car Co.* v. *Transportation Co.*, 171 U.S. 138, 145-146. In announcing the rule, this court approved and cited as authority the decision rendered by Chief Justice Taft, then circuit judge, in *Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569. The opinion in the latter case, reviewing the English and American authorities, states the rule as follows (p. 572):
>
> "'It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases . . . . The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind'.

"*Chicago & Alton R. Co.* v. *Union Rolling Mill Co.*, 109 U.S. 702, 713-715; *Barrett* v. *Virginian Ry., Co.*, 250 U. S. 473, 476; *McGowan* v. *Columbia River Packers' Assn.*, 245 U.S. 352, 358; *Veazie* v. *Wadleigh*, 11 Pet. 55, 61-62; *Confiscation Cases*, 7 Wall. 454, 457-458. The foregoing decisions, together with others, are reviewed in an opinion delivered by Chief Justice Taft in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, and the conclusion as follows:

"'The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one can not affect his right.

"'The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter-case properly pleaded and ready, he may insist that the cause proceed to a decree . . .'"

The *Skinner* case, from which the Court quoted, holds, at page 93, that at common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, that it is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing. To the same effect, see: *Deneen* v. *Houghton Co. St. Ry. Co.*, 150 Mich. 235, 113 N.W. 1126; *Texas Electric Ry.* v. *Cox*, 49 S.W. (2d) 725, 89 ALR 11 93; *Whitaker* v. *Irons*, 300 Ill. 254, 133 N.E. 265.

In the state case below, no counterclaim was filed at the time of the Petitioner's motion for leave to with-

draw her count in equity; and yet she could not be permitted to non-suit one of her counts!

C. Failure of Original Jurisdiction in the State Court.

Judgment against a party to a suit as to whom procedural due process is lacking is just as void a judgment as is a judgment which has been rendered in the absence of proper service of process. Such a judgment is not a judgment but a non-judicial semblance of a judicial act. By denying procedural due process to a party, a court loses jurisdiction. In *Windsor* v. *McVeigh* (93 U.S. 274), the respondent was said to be "excluded from the court's jurisdiction" p. 284. In *Johnson* v. *Zerbst*, 58 S. Ct. 1019, 304 U.S. 458, 82 L. Ed. 1461 (1933), the court said the *jurisdiction was "lost in the course of the proceedings"*. (italics supplied)

Such is the case in the case at bar—judgment was entered in the State Court against the petitioner without jurisdiction, which was null, void, and of no force or effect. In the *Johnson* case, the Supreme Court said: "A court's jurisdiction at the beginning of trial may be lost 'in the course of proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to retain counsel, who has not intelligently waived this constitutional guaranty and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the Court no longer has jurisdiction to proceed. The judgment of conviction pronounced by it without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus*" (p. 468).

In a note which follows the *Johnson* case (146 ALR 359, at 403) under *Due Process Clause of the Fourteenth Amendment*, it is stated that, "The Rule has become well

established * * * that failure of one accused of a state crime to have had the assistance of counsel, prior to the judgment or sentence, under circumstances constituting a denial of justice or a fair-trial within the contemplation of the due process clause of the Fourteenth Amendment to the Federal Constitution may render the judgment or sentence void * * *". For relief, in such an instance, the accused may appeal to the Supreme Court of the United States or, *after he has exhausted* his remedies in the State Courts, *he may directly petition a Federal District Court.* There is no principle in the law that differentiates criminal from civil cases in this respect.

At no time did the Petitioner waive any fundamental constitutional right. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. Cases are uniform on the point that courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. *Aetna Ins. Co.* v. *Kennedy,* 57 S Ct. 809, 301 U.S. 389, 81 L. Ed. 1177, 80 (1937); *Hodges* v. *Easton,* 1 S. Ct. 307, 106 U. S. 408, 12, 27 L. Ed. 169, 71; *O. Bell Tel. Co.* v. *Public Utility Com'n.,* 57 S. Ct. 724, 301 U.S. 292, 307, 81 L. Ed. 1093, 1103 (Cardozo, 1937). And that the State Court lacked in fundamental fairness, and that its conduct was contrary to procedural due process under the Fourteenth Amendment, as announced in *Gibbs* v. *Burke,* 69 S. Ct. 1247, 337 U.S. 773, (Reed, 1949); *Bute* v. *Illinois,* 68 S. Ct. 763, 333 U.S. 640 (Burton 1948); *Glasser* v. *United States,* 62 S. Ct. 457, 315 U.S. 60, 86 L. Ed. 680 (Murphy, 1942); *Cole* v. *Arkansas,* 68 S. Ct. 514, 333 U.S. 196, 92 L. Ed. 644 (Black, 1948).

In other words, the original jurisdiction of a State Court may fail during the proceedings for lack of procedural due process as it did in the instant case.

D. The Actions of the State's Appellate and Supreme Courts Impose No Expression Upon the Merits of the Case at Bar.

The petitioner's contention is that the Judgment of the Cook County Superior Court, Illinois, is *null and void* as non-judicial acts—it was *not merely erroneous.* That the same was affirmed by the State Appellate Court is of no juridical consequence. If the so-called judgment of the said Superior Court was no judgment; if it were a non-judicial act, without any force or effect whatsoever, then the mere affirmance of that judgment by the highest Court of that State, without more, would leave it still null and void. As was said in *Wilson* v. *Montgomery,* 22 Miss. 205, "The Affirmance of a void judgment on grounds not touching but over-looking the invalidity does not make it valid". The doctrine of the *Wilson* case was founded upon *Pender* v. *Felts,* 10 Miss. 535, holding (p. 540) that if a "judgment be in truth void, its affirmance * * * cannot cure the radical error." (See A. C. Freeman on *Judgments,* 5th Ed. Secs. 1228, note 20, pp. 2555; 1187; note 10, p. 2464).

The State Supreme Court, in the instant case, made no determination whether the judgment was entered in the proper exercise of the jurisdiction of the Superior Court of Cook County, Illinois. Nor did that august body write an opinion. Petitioner's application for a *Writ of Error* to, and the denial of it by, the State Supreme Court served a useful purpose in this case as evidence of the *exhaustion* of all available remedies prior to the commencement of this action in the Federal Court, but outside of that, the effect of that denial is wholly immaterial. The same is true of the state Appellate Court's affirmance of the judgment of the Cook County Superior Court.

The Petitioner's action in the Federal Court was not an appellate proceeding. It was a *direct proceeding* to obtain relief from a *judgment void for lack of jurisdiction.* Issues not raised in the former proceedings can be raised in such an action. *Happy Elevator No. 2* v. *Osage Const. Co.*, 209 F. (2d) 459, 61-2 (CCA 10, 1954).

The present action is not similar to the case of *Spencer* v. *Gypsy Oil Co.*, (142 F. (2d) 935, 7), where the state judgment was not void. The present action is identical, however, with *Griffin* v. *Griffin*, (66 S. Ct. 556, 327 U.S. 220, 28, 90 L. Ed. 635, 1945), where there was no due process of law, and, therefore, the judgment was void and subject to collateral attack in either a direct or a collateral proceeding. In the *Spencer* case the resulting judgment was merely *erroneous* and hence not subject to attack except upon appeal.

Nor is the present action similar to *Parnacher* v. *Mount*, 207 F. (2d) 738, where, even though a question of Federal law is presented in a case in state court, if it has complete jurisdiction throughout, and after hearings such state court enters a judgment, which is responsive to the issues, and the judgment is affirmed by the highest court in the state, no court of the United States, other than the Supreme Court on appeal or certiorari, has jurisdiction to review, vacate, or annul such judgment. (see also *Angel* v. *Bullington*, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832)

Therefore, if a State judgment is invalid, its affirmance by the State's highest Courts can give it no juridical validity. Parenthetically, it must be noted that the Illinois Constitutional provision having reference to Appeals by Writ of Error to the Supreme Court of Illinois in civil cases (Art. VI, Sec. 8) has been abolished, not by constitutional means, but by legislation (Chap. 110, Parag. 198), which minimizes the time limit for appeals very

materially. We have no way of knowing the reasons for the dismissal of the Writ of Error by the Illinois Supreme Court whatsoever, but we do know that the change in the Constitutional Mandate has had its sanction!

E. The Personal Rights of the Petitioner Have Been Violated by the Judiciary of Illinois Which Rights Are Guaranteed by the Federal Bill of Rights.

The Petitioner is a citizen of the United States; as such, she is entitled to the *equal protection of the laws*, State and Federal. To be subject to double loyalties is to be entitled to double protection. This dualism is the unique characteristic of American Nationalism. As early as 1885 in *Barbier* v. *Connolly*, 5 S. Ct. 537, 113 U. S. 27, 31), it was conceded that such a person is entitled to pursue her happiness and to have access to the courts of the country for the protection of her person and property and the prevention and redress of wrongs. The facts in the complaint show that this petitioner was deprived of her day in court by action of the Superior Court of Cook County, Illinois, by encroachment upon her Federal rights as embodied in the Seventh Article of the Bill of Rights, and in the *due process* clause of the Fourteenth Amendment.

The Petitioner's suit in the Federal Courts was a sincere attempt to seek justice for a hapless and helpless widow who was defrauded by an adroit real estate broker (A. Kamenjarin) and a shrewd lawyer accomplice (Lafayette Fisher) by a pattern as old as human perfidy. One Leon Mareus,* indicted by the Federal Grand Jury was recently murdered in Chicago before trial. He was the president of *The Trust Company of Chicago*. It was

* Such was the end of one of the architects of the unholy triple alliance.

a fraudulent combination, conspiring to force a widow to deposit $25,000.00 in a questionable real estate transaction without the benefit of counsel. Every technique was pressed into service by that combination for the purpose of circumventing a trial by jury. Eventually a judgment was secured by the perpetration of a fraud upon the State Court and by the use of that agency in carrying out their well-schemed conspiracy.

This Petitioner, throughout the eleven years of litigation, has never seen the inside of a courtroom to tell her tale. As is being repeatedly asserted by some of the defendants' attorneys: "She is morally right but we have got her technically"! The question facing this Honorable Court then is, Do the Federal Courts have jurisdictional power to condemn such practices by coming to her rescue? The right to have access to the courts of the realm, in the opinion of the petitioner, is one of the chief distinctions that sets us apart from totalitarian regimes. Guizot, the French Historian, once asked James Russell Lowell, "How long will the American Republic endure?" Lowell's reply was, "As long as the ideals of the men who founded it continue dominant". One is tempted to wonder whether, by such performance, the State Judiciary is making any substantial contribution to the preservation of Democracy; and, whether such legalistic occurrences were even remotely envisioned by the framers of **The Mayflower Compact** (November 11, 1620) and **The Fundamental Orders of Connecticut** (January 14, 1639)!

There are two clauses of the Fourteenth Amendment that have equal relevancy with the Seventh Amendment to the facts of the case at bar: *Privileges and Immunities* and *Due Process of Law*. Prior to the adoption of the Fourteenth Amendment, the safeguards of personal rights, enumerated in the Federal Bill of Rights, were secured

only against national action, as was adjudiciated by a long series of decisions, beginning with the opinion of Chief Justice Marshall in *Barron* v. *Baltimore*, 7 Pet. 243 (1833). Since its adption these safeguards are among the privileges and immunities of citizens of the United States,* which Amendment protects against State Action. Such is the meaning of our Constitutional Revolution. The Fourteenth Amendment has created a new national citizenship; indeed, it has come to be our new *Magna Charta*, as a result of, what Hannis Taylor calls, the "American Constitutional Revolution", in his *The Science of Jurisprudence* (N. Y., The Macmillan Co., 1908). "It is hard", said he at p. 30, "to exaggerate the importance of the constitutional revolution which, through the creation of this new national citizenship, shifted the center of gravity of the composite structure from the states

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* For an Authoritative approval and confirmation of this argument, see Mr. Justice Field's Opinion (in dissent) in **O'Neil v. Vermont**, 12 S. Ct. 693, 144 U.S. 323 (1892), which case dealt specifically with the Eighth Amendment, in which it was declared that, "every citizen of the United States is protected from the punishments which are cruel and unusual. It is an immunity which belongs to him against both State and Federal Action"; and that such a right "finds its recognition and guaranty against Federal action in the Constitution of the United States, and against State action in the Fourteenth Amendment * * *. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States, but after much reflection I think the definition given at one time before this Court by a distinguished advocate—Mr. John Randolph Tucker of Virginia—is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States." (144 U. S. at p. 361)

The case alluded to by the famous jurist was **Spies v. Illinois**, 8 S. Ct. 22, 123 U.S. 131, 31 L. Ed. 80; and the **distinguished advocate's** definition, which will endure forever, is, in part, quoted on pp. 38-39 of this Petitioner's **Brief** before the Court of Appeals.

to the nation, thus nationalizing the entire sphere of civil liberty".

To state it in another way: the adoption of the Fourteenth Amendment was a signal realization of the implications of the Declaration of Independence. Until its ratification, in 1868, citizenship was a state matter, but the adoption thereof thrusted a new character upon the national arena. The first clause of that Amendment signifies a sudden jump at nationalism. Every American born or naturalized acquires a dual citizenship—that in the nation and that in his state. He becomes the *heir* to two sets of rights —those conferred by the State and those conferred by the Nation.

The privileges and immunities of citizens of the United States embodied in the Bill of Rights, however, were not a new creation but a codification of pre-existing rights. They existed in the Colonies at the time of the expulsion of the British therefrom and were re-affirmed in the Declaration of Independence. **The Declaration of Rights** of the Continental Congress of 1774 asserted the legal rights of Englishmen. And while the Constitutional Convention was engaged in drafting the Constitution, the Congress of the Confederation included in the **Ordinance of 1787** (for the government of the Northwest Territory) Article II, which read: "The inhabitants of the said Territory shall always be entitled to the benefits * * * of the trial by jury. * * * No man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land". The **Declaration of Independence** of 1776 asserted, on the other hand, the natural rights of man, which is the enduring National Creed of America; for each American forward impulse has been — and it must be — an attempt to apply, extend, and realize the maxims of that Declaration. Indeed, the entire history of American

Democracy is a gradual realization of the implications of the Declaration of Independence.

This Court has not always been unmindful of the fact, however, that the Constitution is a living and growing organism, which changes as the relations of society change in its aspirations. For since the decision of *Barron* v. *Baltimore*, in 1833, the Supreme Court has come to recognize, in *Gitlow* v. *New York*, 45 S. Ct. 625, 268 U.S. 652, 69 L. Ed. 1138, 1925, that although the First Article forbids action only by Congress, the Fourteenth Amendment has incorporated into a restriction so that *freedom of speech and of the press*, which is protected by the First Amendment from abridgment by Congress, is among the fundamental rights and liberties protected by the *Due Process* clause of the Fourteenth Amendment from impairment by the States.

This Court has substantially enlarged, further, the meaning of *liberty* appearing in the *due process* clause of the Fourteenth Amendment. In 1897, in the case of *Chicago, B. Q. R. Co.* v. *Chicago*, 166 U.S. 226, which involved an issue of *eminent domain*, the seven Justices held that the Fifth Amendment's explicit guarantee against the taking of private property without just compensation is included in the *due process* clause of the Fourteenth Amendment, and that "the mere form of the proceeding instituted against the owner • • • cannot convert the *process* used into *due process* of law, if the necessary result be to deprive him of his property without compensation" (pp. 236-7). And at page 241, Mr. Justice Harlan continued:

> "In our opinion, a judgment of a State Court • • • whereby private property is taken for the State • • • for public use, without compensation • • •, is, upon principle and authority, wanting in due process of law required by the Fourteenth Amendment of the Con-

stitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument".

Mr. Justice Harlan further observed in the *Chicago, Burlington* case that the contention the defendant has been deprived of property without due process of law is not entirely met by the suggestion that *he had due notice of the proceedings* for condemnation, *appeared*, and *was admitted to make defense*. The judicial authorities of a State may keep within the letter of the statute * * * and give the parties interested the fullest opportunity to be heard, and yet it might be that its action would be inconsistent with the Amendment (pp. 234-5). In the present case, a cursory examination of the proceedings will reveal that the judicial proceedings of the State of Illinois were an empty show!

That this Court has substantially enlarged in 1957 the meaning of *due process* clause of the Fourteenth Amendment is again revealed in *Schware* v. *Board of Bar Examiners*, 77 S. Ct. 752, 353 U.S. 232, 1 L. Ed. (2d) 796 (1957); and in *Konigsberg* v. *State Bar of California*, 77 S. Ct. 353, U.S. 252, 1 L. Ed. (2d) 810; in which cases, this Court held that the denial of the applicants' requests to take the bar examinations amounted to a *deprivation of due process*.

"Trial by jury in civil actions in State Courts", says the Opinion of the Court of Appeals in the case at bar, at page 524, "May be modified by a state or abolished altogether". This pronouncement is academic, pure and simple, and has no practical or theoretical reality in the American system of jurisprudence. As a matter of fact there is no modification or abolition—and there cannot be—of jury trials in Illinois; and even if such were to be the

case (*by constitutional means*), it would have equality of application to all citizens alike, and in no instance could one plaintiff be singled out, as it is in the case of the petitioner herein. It is far more reasonable and accurate to say that no state can abolish trials by jury. Long, long before the Declaration of Independence, the Constitutions, State and National, **The Massachusetts Body of Liberties of 1641** (Articles 50 and 57), and **The Declaration of Rights of 1765,** made specific references to the sanctity of trials by jury. The latter *Declaration* asserted in Article 4 that "trial by jury is the inherent and inalienable right of every British subject in these Colonies." And, implicit in the **First Charter of Virginia** of April 10, 1606 (granted by James I to the oldest of the British Colonies in America, authorizing adventurers to plantations in the New World, "Virginia" applying to all that part of North America claimed by Great Britain) was the transplantation of all the laws of that country, including trials by jury, in the New Land. The Circuit Court of Appeals lacked the boldness to declare that the jury-system is rooted in the very anatomy of the American citizen, but indulged in a subtle, verbal casuistry; and its opinion displays neither logic nor research.

The Opinion below trivializes, very unduly, the true meaning of the *due process* clause of the Fourteenth Amendment, unmindful of the fact that this matter still divides, very sharply, the Justices of the highest Court of the land, as (it) may readily be seen by reference to the recent case of *Adamson* v. *California*, 67 S. Ct. 1672, 332 U.S. 46, 91 L. Ed. 1903, 171 ALR 1223 (1947). That case may yet soon suffer the same casualty as did the case of *Plessy* v. *Ferguson*, 16 S. Ct. 1138, 163 U.S. 537 (1896) —as it must if the *Declaration of Independence* is to continue to be the enduring National Creed of American

Democracy. Eternal vigilance still has its imperatives. Did not Gibbon rightly laugh at the statesmen of rotting Byzantium for their high sounding titles and phrases?

Mr. Justice Black of the Supreme Court renders a detailed recitation of historical documents in his dissenting opinion (in 1947) in the *Adamson* case (67 S. Ct. 1684-1711) in support of the contention that it was the original purpose of the Fourteenth Amendment to extend to all the people of the nation the complete protection of the Federal Bill of Rights by reason of its inclusion within the Due Process Clause of that Amendment, insisting that *Maxwell* v. *Dow*, (20 S. Ct. 448, 176 U.S. 581, 44 L. Ed. 597) and *Twining* v. *New Jersey*, (29 S. Ct. 14, 211 U.S. 78, 53 L. Ed. 97) are erroneous. Three Justices concurred in his prophetic vision (Douglas, Murphy, and Rutledge). That is the law of the Due Process Section of the Amendment, and not the opinion of the majority. We are cognizant of the writers of conventional articles, however, as for example Prof. Charles Fairman, Prof. Stanley Morrison, (2 Stanford University Law Review, 1949-50 pp. 5-173) and others, who categorize these dissenting Justices as the *left wing of the Court*. So was Mr. Justice John Marshall Harlan in 1896 with reference to his dissenting opinion in *Plessy* v. *Ferguson*, where the decision was concerned with the question of whether a State could segregate Negro train passengers from White without violating the constitutional rights of its citizens. The Court said "Yes", provided the service was equal. By this majority opinion, the *Separate but Equal* doctrine was written into American law. Oddly enough, the lone dissent of this Justice is more widely quoted than the majority opinion, and it has a titanic importance for the case at bar. Said Mr. Justice Harlan in 163 U.S. at 559:

> "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant,

> ruling class of citizens. * * * Our Constitution is color-blind * * *. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful * * *. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race * * *. In my opinion, the judgment this day rendered will in time prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case * * *. The thin disguise of equal accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done (p. 562) * * *".

This analysis of the great jurist is the only valid interpretation that can be placed on the Constitution. That *was* the law then; it *is* the law now. The Court took over fifty years to *discover* it. If this dissent had been adopted as the majority opinion, the subsequent history of race relations would not have been such as now to imperil the future of Democracy. Unfortunately, it was not. In the years between 1948 and 1954, however, this Court, in a series of important civil rights cases, gave clear warning that it would not tolerate for much longer *separate but equal* as a constitutionally acceptable practice. And finally, in 1954, a unanimous Supreme Court decision in *Brown* v. *Bd. Education*, 74 S. Ct. 686, 347 U.S. 483, repudiated the *separate and equal* doctrine for the travesty on truth and justice which it had always been, declaring that "separate educational facilities are inherently unequal". Said Chief Justice Warren (p. 692): "Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding (segregation is detrimental) is amply supported by modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected". (Citing a wealth of authorities)

Is there any historical or logical reason or justification, in the *Adamson* case, for incorporating the First Amendment and some others into the Fourteenth Amendment without similarly incorporating the remaining articles of the Bill of Rights? What canon of constitutional interpretation can support that type of subjective selectivity? Logic certainly preponderates in favor of the four dissenters and the position of the majority is untenable. Once again Democracy's history in America as a gradual realization of the implications of the memorable *Declaration of Independence* proved too rapid for the bare majority. Mr. Justice Black is right when he declares: "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so, to what degree, is to frustrate the great design of a written Constitution", 67 S. Ct. 1695.

The case of *Plessy* v. *Ferguson* establishes momentous conclusions. It affords an illuminating example of the manner in which our Constitutional Law grows; and it is not the only instance in which early dissenting opinions have quietly become, at a later date, the opinion of the Court, without the direct overruling of previous majority decisions. It also shows that at times the majority opinion is no more sacrosanct than the minority opinion. That the majority opinion of this Court is legally final does not make its wisdom infallible. It was not right (we now realize) in the *Dred Scott* decision (60 U. S. 393, 15 L. Ed. 691), rendered in 1857 and reversed by a five frightful years of Civil War at the cost of one million lives. It is in this sense that many lawyers have justifiably stated that the opinions of, for example, Holmes and Brandeis in dissent have had far greater influence on patterns of American thought in many cases than the holding of the majority. The important thing is not always what man

can agree on, but what is worth fighting for. This Court is presented once again with a great opportunity, in firm necessity, to aid the triumph of judicial statesmanship. For, *due process* in judicial proceedings is one of the compelling issues of the times. Its elusive aspects demand a new, comprehensive definition. In the case of this Petitioner, stripped of legal trapping and the purely legalistic arguments—beyond them all, we insist, lies the more important question of substantial justice. The right to trial by jury is too fundamental to our entire jural and ethical system. The pending matter cannot be divorced from injunctions Biblical, prohibiting the *devouring of widows*. (*Matthew*, 23:14; *Malachi*, 3:5; *Isaiah*, 1:17, 1:23; *Deuteronomy*, 24:17, 27:19; *Exodus*, 22:23). Nor can loyalty to *stare decisis* claim any special sanctity. Loyalty is not conformity. Loyalty is an ideal, a principle, a Realization—a realization that America was born of revolt, flourished on dissent, and became great through like instrumentalities. There is in the United States of America of 1957 no lack of interest—and there cannot be—in the eternal search for the *new America*. That is constant, and the United States of America is always new.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12002 SEPTEMBER, 1956 TERM—APRIL, 1957 SESSION

ELSA M. OLESEN,
Plaintiff-Appellant.

v.

THE TRUST COMPANY OF CHICAGO, as Trustee under Trust Agreement dated March 23, 1945, and known as Trust No. 4526; and A. KAMENJARIN and LAFAYETTE FISHER,
Defendants-Appellees.

On Motion to Dismiss

June 27, 1957

Before DUFFY, *Chief Judge* and LINDLEY, *Circuit Judge*.

DUFFY, *Chief Judge*. This matter comes before us upon a motion to dismiss the appeal upon the ground that jurisdiction is lacking.

Plaintiff filed a suit against defendants in the Superior Court of Cook County, Illinois. An amended complaint contained a count at law and a count in equity. On plaintiff's motion the equity count was referred to a Master in Chancery and plaintiff offered proofs before the Master.

The equity count asked cancellation of a note executed by plaintiff as part of an earnest money payment in a real estate transaction. The law count sought recovery of the cash portion of the earnest money payment. The Trust Company filed a counterclaim asking judgment upon the note.

The basis for the relief asked in both the law and equity counts and plaintiff's defense in the counterclaim, were all predicated upon the same allegation of fraudulent representations alleged to have been made by or upon behalf of defendants in inducing the making of the contract. In dismissing the equity count, the Court adjudged that no fraud existed.

In considering the law count and the counterclaim the Superior Court held that the determination of the equity count constituted an adjudication on the question of fraud and without taking further evidence, entered judgment dismissing the law count and awarding the Trust Company of Chicag as Trustee judgment against the plaintiff for the sum of $14,250.00.

Plaintiff sought to vacate the judgment urging that her right to a trial by jury had been denied in violation of Article II of the Illinois Constitution, and of the Seventh Amendment of the United States Constitution. The motion was denied.

Plaintiff appealed to the Supreme Court of Illinois which Court transferred the cause to the Illinois Appellate Court, First Division. The Appellate Court affirmed the Superior Court holding, among other things, that plaintiff was not deprived of the right to a jury trial as there were no issues of fact left for decision. The Court also held plaintiff was not deprived of any constitutional right. Plaintiff sued out a writ of error to the Supreme Court of Illinois and that Court dismissed the writ of error.

It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States

Constitution applies to trials in the United States Courts. *Bute* v. *Illinois*, 333 U.S. 640, 657 (footnote). Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. *Walker* v. *Sauvinet*, 92 U.S. 90; *Maxwell* v. *Dow*, 176 U.S. 581; *New York Central Railroad Company* v. *White*, 243 U.S. 188, 208; *Wagner Electric Manufacturing Company* v. *Lyndon, et al.*, 262 U.S. 226, 232.

A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure." *Hardware Dealers Mutual Fire Insurance Company* v. *Glidden Co., et al.*, 284 U.S. 151, 158.

Plaintiff insists she tried to dismiss her count in equity and that the refusal by the state court to permit her to do so deprived her of property without due process of law. We hold this contention to be entirely without merit.

Ordinarily we are reluctant to dismiss an appeal upon motion. Usually we take the motion to dismiss with the cause and consider same when the case is submitted on the merits, but in the case at bar, it would be an imposition upon the defendants to inflict the expenses incident to an appeal when it is so clear that nothing that could be presented upon the hearing of the cause could change the obvious fact that this is a case where no federal question is involved, and the Federal Courts should not interfere with the processes and procedures of the State Court.

The appeal is dismissed at plaintiff's costs.